No. 84-267

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

WILLIAM P. CLARK, ET.AL., PETITIONERS

V.

SOUTHERN OREGON CITIZENS AGAINST TOXIC SPRAYS, INC.
RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

BRIEF OF AMICUS OREGONIANS FOR FOOD & SHELTER, INC.

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In The

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William P. Clark, Secretary of the Interior
Petitioners

v.

Southern Oregon Citizens Against Toxic Sprays, Inc.,

Respondents

Petition for Writ of Certiorari to the

United States Court of Appeals for

The Ninth Circuit

Brief of Amicus Curiae

Oregonians for Food & Shelter, Inc.

In Support of Petitioners

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule No. 36, Oregonians for Food & Shelter Inc., (OFS) respectfully submits this brief amicus curiae in support of petitioners. Consent to the filing of this brief has been granted by counsel for both parties. Copies of these letters of consent have been lodged with the Clerk of this Court.

Oregonians for Food & Shelter, Inc. ("OFS") is a non-profit, tax-exempt corporation, organized and existing under the laws of Oregon for the purpose of pursuing the public interest involved in the appropriate use of pesticides. To that end OFS has undertaken programs of study and publicity designed to aid the general public in understanding the vital,

essential role played by pesticide use in maintaining our forest, farm and agricultural economies, with particular emphasis on the Northwest. OFS has over 2,000 members drawn from a diverse cross-section of the farm, forestry, medical, small business and domestic user sectors of Oregon society.

OFS is particularly concerned as a public interest organization about the practical effects of the Ninth Circuit's decision to impose a worst case analysis requirement on Bureau of Land Management's ("BLM") use of pesticides. In this regard it is essential for the Court to be aware of the relationship that exists between federal programs for weed control and food and fiber production and those implemented by the private sector. The

Ninth Circuit's decision will not be isolated in its ramifications to the research and fiscal burden it unnecessarily imposes on BLM. The most onerous burden will fall on the tri-partite cooperative herbicide programs conducted by the private sector with local and state governments and individual federal agencies. In addition, the yield of biddable timber available to the private sector from BLM managed forest lands will decrease as a result of the cessation of herbicide use. Furthermore, the inability of BLM to pursue its timber management programs, in which the use of herbicides is central, will have direct affects on surrounding farm and privately held timber lands, increasing the burden of weed control on lands adjacent to federal property. If

BLM is forbidden to use herbicides until all information gaps are filled and all scientific uncertainty removed, a task which it is beyond known methodology to fulfill completely, it will only be a short step to imposition of a similar requirement on all pesticide use. Indeed a law suit with just that end in mind has already commenced in the United States District Court for the District of Oregon, (Eugene), (Paul E. Merrell v. William D. Ruckelshaus et. al., No. 84-6185-E).

For the foregoing reasons it is essential that the Court be aware of the importance of the contribution which herbicide use makes both to the forestry and to the farm economies in Oregon. It is at this level that the Ninth Circuit's decision in this case will ultimately be

felt. A brief thumbnail sketch derived from the expert testimony submitted in NCAP v. Block, et.al, Civ. No. 82-6272 (D. Or. Jan 6, 1984), appeal pending, No. 84-3821 (Ninth Circuit), (hereinafter "NCAP"), reveals the dilemma in which the Ninth Circuit's decision in SOCATS v. Clark 720 F.2d 1475 (9th Cir. 1983) has placed the forest products and agricultural industries in Oregon.

The Contribution To Forestry Production of Pesticide Use in Oregon.

According to the testimony given by Dr. Douglas J. Brodie in NCAP, the cessation of herbicide use on both private and public forest lands in Western Oregon alone would entail a loss of $291,000,000 annually, (p. 4, Statement of Dr. Douglas Brodie, NCAP v. Block, D. Or., Civil No.

83-6273-E, hereinafter "Brodie").

The further implications of this loss were drawn out by Dr. Brodie when he stated that,

> . . . the total direct employment loss from the decrease in harvest volume (of timber) due to the inability to apply herbicides amounts to 13,095 jobs when sustained yield is achieved. In addition to that number, additional jobs are lost in the service sector: conservative estimates indicated that for every job in the forest products industry lost, an additional 1.5 jobs are lost in the service sector (yielding unemployment multiples of 2.5) . . . Totalling entire job loss, one multiplies the 13,095 direct jobs by 2.5 to obtain a total job loss of 32,737. (Brodie at 5.)

Very little of this loss will be felt immediately due to the nature of timber growing and harvesting. According to Dr. Brodie, this is due to the fact that ". . . the current low volume of

timber in existing stands and the fact that herbicide treatments are applied to stands that won't be thinned for three decades or final harvest for six decades", accounts for the lag in impact. (Brodie at 5.)

Dr. Brodie concluded his testimony with the observation that,

> Scarcity of available timber or harvest is the prospect for the private entrepreneur seeking raw material supplies for the timber industry on either public or private lands over the next several decades . . . A ban on a productive agent such as chemical herbicides will intensify the long-term scarcity problem on both public and private lands and compound the problems of private purchasers and processors.

The affects on agricultural operations are no less dramatic than those that will follow a severe restriction on the use of herbicides in forestry production. It is

to the specific affects of the Ninth Circuit's decision and its implications for agriculture that attention is now directed.

The Affect of Public Land Management on Private Agriculture in The Northwest.

When considering the NCAP testimony of Dr. Arnold Paulsen, the relationship between public land management and private agriculture is most clearly brought to the fore. Dr. ~~Brodie~~ PAULSEN stated that,

> [i]f Federal agencies do not control weeds, infestation of adjacent private lands via wind, water and animals will be quick and complete. Incentive to control weeds on private range will be small if Federal agencies are enjoined by court order from controlling weeds. Federal lands are usually located at higher elevations and wind and water scatter weed seeds on

> private lands. (p.3, testimony of Dr. Arnold Paulsen in NCAP v. Block, D.Or Civ No. 83-6273-E, hereinafter Paulsen.)

Dr. Paulsen was also very clear on the nature of the specific problems facing Oregon's farmers and the beneficial affects herbicides have in treating these recurring problems. He stated that,

> Grass, forage, range and hay are the products of 20-30 million acres in Oregon and Washington. Weeds, brush and juniper regularly invade these areas and reduce the animal grazing capacity of the land. Herbicides are needed to maintain and increase the volume of feed. Weeds also reduce the quality of forage and the value of pasture and the price of private land. (Paulsen at 2)
>
> . . . Federal agencies should not be allowed to withdraw from area wide herbicide control of weeds but should rather be required to fully participate in all area wide efforts to control range weeds. Herbicides are the most effective and lowest cost

method of range weed control. (Paulsen at 3).

The partnership between private agriculture and the federal government will come to a virtual halt if in every case where an agency wished to use a herbicide (which is already registered by the EPA), it had first to produce a worst case analysis for that herbicide as not having an unreasonable adverse affect on the environment. The concerns of OFS are fuelled by the seeming abdication of the Ninth Circuit from any consideration of the practical affects its decision to demand a worst case analysis will have on the forestry and agricultural sectors of the Oregon economy. The lack of reflection on the real world affects of their decision, seemingly made in the

abstract, draws attention to the ethereal nature of the Court's analysis. It is the intention of amicus in this case to present to this Court an alternative view of the Council on Environmental Quality Regulations at issue, a view that implements the policy of those regulations, as well as fulfilling the Congressional mandate set forth in the National Environmental Policy Act, (42 U.S.C., Sec. 4321-4361) (hereinafter "NEPA") and the Federal Insecticide Fungicide and Rodenticide Act (7 U.S.C., Sec. 136-136y) (hereinafter "FIFRA").

SUMMARY OF ARGUMENT

The Ninth Circuit erred in failing to articulate risk criteria for determining when a worst case analysis would provide relevant information to a decision-maker

engaged in a herbicide use decision under NEPA.

ARGUMENT

The Council on Environmental Quality Regulations and the Worst Case Analysis.

The fundamental concept of central signficance in this case is that of "relevance". It is this idea that links the Council on Environmental Quality's ("CEQ") interpretation of NEPA, in its Regulations, to the Congressional mandate contained within the registration requirements for pesticides in the much amended Federal Insecticide, Fungicide and Rodenticide Act.

The CEQ Regulations at issue in this case are to be found in 40 CFR 1502.22(a)-(b). Those regulations contain the requirements for the so-called worst case analysis procedure which is to be used in certain

environmental impact statements in order to satisfy NEPA. Not all environmental impact statements are required, or even expected, to contain a worst case analysis. The triggering mechanism is whether the information is "necessary" to the reasoned and informed decision-making demanded by NEPA.

In pertinent part the regulations require that,

> When an agency is evaluating signficant adverse affects on the human environment in an environmental impact statement and there are gaps in relevant information or scientific uncertainty, the agency shall always make clear that such information is lacking or that uncertainty exists.
> (a) If the information relevant to adverse impacts is essential to a reasoned choice among alternatives and is not known and the overall costs of obtaining it are not exorbitant, the agency shall include the information in the environmental impact statement.

> (b) If (1) the information relevant to adverse impacts is essential to the reasoned choice among alternatives and is not known and the overall costs of obtaining it are not exorbitant or (2) the information is relevant to adverse impacts, is important to the decision and the means to obtain it are not known (e.g., the means for obtaining it are beyond the state of the art) the agency shall weigh the need for the action against the risk and severity of possible adverse impacts were the action to proceed in the face of uncertainty. If the agency proceeds, it shall include a worst case analysis and an indication of the probability or improbability of its occurrence. 40 C.F.R. 1502.22(a)-(b). (emphasis added)

The primary issue to be addressed in applying CEQ's worst case analysis requirement is that of the relevance of the information to the decision. Even where, as in this case, the dispute is about the existence of scientific uncertainty, the matter resolves itself into a debate on

relevance. As there will always be some gap in information, because one can never have perfect information (See, generally, The Study of Policy Formation, (R.A. Bauer and K.J. Gorgen, eds., 1968); G. Calabresi and P. Bobbit, Tragic Choices, (1978)) the question will be: Is the gap in information, which gives rise to the uncertainty in the scientific community, relevant to the decision, or is it simply a lament directed at the, as yet unachieved, perfectability of human knowledge? To some extent that could be a very subjective determination but within environmental law that decision is bounded, especially where herbicides are concerned, by the general legal framework erected by the NEPA requirements and the specific dictates of FIFRA.

Consideration of Relevant Consequences Under NEPA

The Case Law

The CEQ Regulations setting forth the need for consideration of the consequences of the proposed action codifies the prior law, (Sierra Club v. Sigler, 695 F.2d 957, 971 (5th Cir. 1983)). That law erected a rule of reason by which to judge an agency's consideration of the consequences to the environment of its proposed action. According to the Sierra Club v. Sigler, Court, supra at 971,

> The CEQ's worst case analysis regulation merely codifies these judicially created principles. The CEQ has declared, in accord with the requirement of Scientists Institute, that "the purposes of the analysis is to carry out NEPA's mandate for full disclosure to the public of the potential consequences of agency decisions, and to cause agencies to consider these potential con-

> sequences when acting on the basis of scientific uncertainties for gaps in available information." Forty Most Asked Questions Concerning CEQ's NEPA Regulations, 46 Fed. Reg. 18,026, 18,-032 (1981) (Answer to Question 20b).

The existence of uncertainty or gaps in information is not in itself sufficient to trigger the need for a worst case analysis. Given the finite nature of knowledge, there will always be less than complete information available on the totality of our world. On a down to earth, practical level, the level at which the government is intended to operate, it is necessary to decide which uncertainties or gaps in information are relevant. It is simply not sufficient, either in law or in practice, to identify an uncertainty or a gap in information without going one step further and announcing a criteria of

relevance which would allow one to identify relevant gaps in information and relevant uncertainties. Otherwise NEPA statements would become little more than preludes to science fiction of an impractical nature; a barrier to action rather than a guide to implementation of vitally necessary government undertakings.

It was to this very point that the Court in Trout Unlimited v. Morton 509 F.2d 1276, 1283 (9th Cir. 1974), was addressing itself when it stated that,

> Appellants urge that the EIS is inadequate because it fails to discuss many possible environmental consequences. Many of these consequences while possible are improbable. An environmental impact statement need not discuss remote and highly speculative consequences. EDF v. Corps. of Engineers, 348 F. Supp. 916, 933 (N.D. Miss. 1972) aff'd, 492 1123 (5th Cir. 1974). This is

> consistent with the (CEQ) Council on Environmental Quality Guidelines and the frequently expressed view that adequacy of the content of the environmental impact statement should be determined through use of a rule of reason. Lathan v. Brinegar, supra; EDF v. Corps. of Engineers, 492 F.2d 1123 (5th Cir. 1972); Life of the Land v. Brinegar, supra; National Resource Defense Council v. Morton, 458 F.2d 827 (DC. Cir. 1972). A reasonably thorough discussion of the significant aspects of the probable environmental consequences is all that is required by an environmental impact statement.

The Ninth Circuit has in the past agreed with this general approach. In Warm Springs Dam Task Force v. Gribble, 621 F.2d 1017, 1026 (9th Cir. 1980) the court stated that,

> The Task Force complains that the environmental impact statement contains no discussion of the consequences of total failure of the dam in the wake of a catastrophic seismic event. We hold that such discussion is

> unnecessary. An impact statement must be particularly thorough when the environmental consequences of federal action are great. See Iowa Citizens for Environmental Quality, Inc . v. Volpe, 487 F.2d 849, 852 (8th Cir. 1973). However, an impact statement need not discuss remote and highly speculative consequences. Trout Unlimited v. Morton, 509 F.2d 1275, 1283 (9th Cir. 1974).

Even if it were possible to remove all uncertainty about the consequences of a particular governmental action and to fill all information gaps prior to commencement of a particular project which had admitted environmental consequences, it is far from clear that such would be necessary under the dictates of NEPA as interpreted by the United States Supreme Court. The Court, in its recent decision in Metropolitan Edison Company v. PANE, 51 USLW 4371, 4374, pointed out that,

> Time and resources are simply too limited for us to believe that Congress intended to extend NEPA as far as the Court of Appeals has taken it. See Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 551 (1978). The scope of the agency's inquiries must remain manageable if NEPA's goal of "ensuring a fully informed and well considered decision" id, at 558, is to be accomplished . . . NEPA does not require agencies to evaluate the effects of risk, qua risks.

Likewise, NEPA does not expect an agency to resolve uncertainty or fill an information gap simply because they exist. The reason for doing so must be that it is relevant to the decision, the major federal action for which the environmental impact statement is being prepared. Only relevant uncertainties and relevant information gaps need be addressed in the environmental impact statement.

In general, the test for relevancy will depend on a number of factors including the type of project contemplated, the nature of the risks that are uncertain, the probable importance of any perceived information gaps and the value of the missing information to the project at hand.

In the instant case, which concerns the use of certain herbicides, however, it is unnecessary, and probably undesireable, to rely upon general criteria of relevance. Congress has very clearly articulated the criteria of relevance in this field. Congress has had the opportunity over the last 40 odd years to address itself to the very question under consideration here: At what point do possible risks to people and their environment, through the

use of herbicides, rise to the level of relevance such that it is necessary for the government agency, whose sole responsibility is as caretaker of the environment, to address them?

In enacting and amending the Federal Insecticide, Fungicide and Rodenticide Act, (FIFRA) (1947) Congress has directly and repeatedly considered the environmental affects of herbicide use. Congress has also considered the role that the EPA should play in protecting human kind and the environment from risks that might arise from the use of herbicides. In addition, Congress has laid down a very clear test of relevance for such risks and their investigation.

FIFRA and the Environment.

FIFRA was enacted in 1947 and it has since been amended on several occassions. In 1970 Congress made EPA the sole agency responsible for registering herbicides, Pub. L. No. 92-516, October 21, 1972. The major Congressional focus in the 1972 amendments was on the environment and the affect on the environment of herbicide use. For this reason Congress made protection of the environment an explicit and dominant criterion in the registration process for all pesticides. In the definition sections of the Act, Congress very carefully provided that,

S.2. Definitions.

. . .

(x) Protect Health and the Environment. The terms 'protect health and the environment' and 'protection of health and the environment' mean protection against any unreasonable adverse affects on the environment.

In turn the term "unreasonable adverse effects on the environment" is itself defined as,

(bb) Unreasonable Adverse Effects on the Environment.

"The term 'unreasonable adverse effects on the environment' means any unreasonable risk to man or the environment, taking into account the economic, social and environmental costs and benefits of the use of any pesticide.

EPA was commanded under the Act to register a pesticide for use only if the pesticide warranted the claims made for it, its labeling complies with the Act,

and it would not generally have any unreasonable adverse effects on the environment, 7 U.S.C., S. 136a (c)(5) (Supp. III 1979. See also, (1972) U.S. Code Cong. and Ad. News 4117). A FIFRA registration of an herbicide is therefore equivalent to an EPA decision that the herbicide will not have an adverse impact on the environment if used in accordance with its label instructions and in accordance with widespread and commonly recognized practice.

That this is so is borne out by the legislative history of the Act. In the Section-by-Section analysis of the Act, the legislative history notes that,

> Subparagraph (B) specifies that a general use pesticide is one which the Administrator has determined will not cause unreasonable adverse effects on the environment when applied in accordance with its directions for use and warning or caution statement, or in accordance with a commonly recognized practice. ((1972) U.S. Code Cong. and Ad. News 4118).

By the time that Congress came to amend FIFRA in 1978 serious problems in its administration had arisen. According to the House Report on the 1978 amendments,

> The registration and reregistration process, which is the foundation of the program, has come to a virtual halt. This had impacted seriously on the availability of pesticides in the production of crops and has affected the ability of pesticide formulators both large and small to continue in the business; it has frustrated the public and the Congress. Even the Agency (the EPA) has admitted serious problems are occurring in the administration of the program and has requested legis-

> lative relief. This has not been the fault of any one factor. ((1978) U.S. Code Cong. and Ad. News 1991).

If the Ninth Circuit's view of NEPA were to prevail, it would re-instate the very same problem that the Congress attempted to alleviate in its 1978 amendments to FIFRA. The use of herbicides, passed upon by EPA as not presenting an unreasonable adverse threat to the environment, would come to a halt, at least insofar as Federal agencies are concerned. Private users of herbicides would continue to use the same herbicides forbidden to the agencies. All of the herbicides used by private entities and individuals have been approved by EPA under the Congressionally mandated environmental standard. Yet, the Federal agencies, such as BLM, would be precluded from using EPA approved

herbicides in performing their legislatively mandated tasks.

In order to deal with the problem of pesticide registration under the 1972 version of FIFRA, Congress adopted a number of amendments. The amendments to the Act were intended to alter the administrative method of registration approval. The alterations in the structure of FIFRA evidence a continuing concern for the environment. For instance, in permitting "conditional" registrations under certain circumstances by relaxing the need for proof of efficacy, the Congress steadfastly insisted that the full environmental standard continue to apply. While seeking administrative effectiveness the Congress refused to sacrifice its primary concern with the environment and the need to

guard it against degradation. According to the House Report,

> Conditional registration would be allowed for a pesticide identical or substantially similar to a currently registered pesticide and for a new use of an already registered pesticide only if, in each case, it would not significantly increase the risk of unreasonable adverse effects on the environment. . . A third type of conditional registration would apply to a pesticide containing new active ingredients but only if it would not cause any unreasonable adverse effect on the environment during the period of conditional registration. (emphasis added) ((1972) U.S. Code Cong. and Ad. News 1992,3).

A "conditional" registration has to meet the full environmental standard for ordinary registrations under FIFRA. The only "conditional" aspect to these registrations sanctioned by Congress under the 1978 amendments is the issue of efficacy

themselves. It is a Congressional decision to allow users to assess the efficacy. However, environmentally, the full rigor of the Act still applies.

Another area of Congressional focus in 1978 concerned the administrative process by which registrations were to be cancelled or suspended under the 1972 version of FIFRA. In 1977, EPA had introduced what is known as the Rebuttable Presumption Against Registration (RPAR) whenever it sought to gather evidence prior to its decision to cancel or suspend the registration of a herbicide previously approved by it. As the House Report explained,

> Several of the witnesses discussed at length the criteria used by the Agency to trigger a Notice of Rebuttable Presumption Against Registration (RPAR). Under this administrative procedure established by the Agency, suspect chemicals are reviewed, and when the Agency determines that there is some evidence to indicate the possibility of either environmental or health hazard, an RPAR, or public notice, is issued seeking information from manufacturer, users and other interested parties to rebut the presumption of risk based on the cited evidence and to submit information about benefits derived from the use of pesticides. Some of the witnesses expressed concern over the validity of the risk criteria used and indicated some concern over the effect of such a notice on the market appeal of the pesticide. (emphasis added) ([1978] U.S. Code Cong. and Ad. News 2050).

The Congress was very consciously addressing its mind to the problem of risk assessment and the affect of herbicides on the environment. That is

not a dissimilar question to that before the Court in this present petition. Congress was aware that, "[h]uman exposure to pesticides through any medium or pathway is a central issue in evaluating the unreasonably adverse effects of pesticide products" (supra at 2052.) However, Congress was also aware that our laws must be fixed on reality, not simply on our fears, no matter how well grounded those fears may appear in the abstract. For that reason, Congress added Sec. 3(c)(8), 7 U.S.C., Sec. 136a(c)(8) (Supp. III 1979), to the 1978 version of FIFRA in order that EPA predicate any interim administrative review of a pesticide only upon "a validated test or other significant evidence raising prudent concerns of unreasonable adverse risk to man or to

the environment", (See (1978) U.S. Code Cong. and Ad. News 2051).

The House Report is very clear in its condemnation of EPA proceeding on the basis of mere fears and surmise. To trigger in-depth analysis of the environment and the consequences of herbicide use, Congress demanded more than mere conjecture on allegation of risk.

The House Report states that,

> The Administrator shall insure that pesticides shall be subject to the RPAR process only on the basis of a validated test or other significant evidence (and not on the basis of unsubstantiated claims), that the term "validated test" be defined as a test conducted and evaluated in a manner consistent with accepted scientific procedures, and that the term "other significant evidence" be defined as evidence that relates to the uses of a pesticide and their adverse risk to man or to the environment. It is the intent

> of the conferees that "other signficant evidence" of adverse risk means factually significant information and is not to include evidence based only on misuse of the pesticide. (emphasis added) ((1978) U.S. Code Cong. and Ad. News 2051).

Congress very clearly laid down its own test for what is a relevant risk or a relevant information gap associated with the use of an herbicide and its possible affect on the environment. The test of relevance is that a purported risk rises to the level of relevance only when it is based on "a validated test or other significant evidence raising prudent concerns of unreasonable risk to man or to the environment", supra at 2051. The legislative history of the 1978 FIFRA amendments is all the more compelling when it is remembered that in enacting

those amendments Congress was addressing itself simultaneously to concerns of the environment, the use of herbicides, and the task of erecting a useful, relevant test for risk assessment to be used in EPA evaluation of herbicide use impact on the environment. Those trilogy of concerns repeat themselves in this case. It is this same three-part problem on which the Ninth Circuit delivered its SOCATS v. Clark, 720 F.2d 1475 (9th Cir. 1978), (hereinafter "SOCATS") decision.

The Ninth Circuit Decision in SOCATS v. Clark: A failure to understand the nature of decision-making.

In interpreting the CEQ's regulations on the need for a worst case analysis the Ninth Circuit in SOCATS, supra, purported to be applying

what it termed "a common sense interpretation", of the C.E.Q. NEPA Regulations, 40 C.F.R. 1502.22, SOCATS supra at 1479. The District Court had found there to be "scientific uncertainty" as to the environmental and human health impacts of the use of herbicides SOCATS supra at 1477. From the simple existence of "scientific uncertainty" the Court of Appeals concluded that a worst case analysis had to be conducted, SOCATS, supra at 1481. However, as is pointed out above, a worst case analysis is required under the CEQ Regulations only when the information is "relevant to adverse impacts". Yet the Court's decision would also cut BLM off from reliance on the fact of EPA registrations of the herbicide. because the Court stated that, "[t]he BLM must

assess independently the safety of the herbicides that it uses" and may not depend on the EPA registration of the same herbicide under FIFRA.

The Ninth Circuit Court of Appeal's decision contains limited analysis and tends to give way to an almost irresistible urge on its part to assert what the law should be, rather than searching for what the law is. The Court appears to be unaware that scientific uncertainty, at some level, will always exist. The most extensive worst case analysis will not remove all scientific uncertainty or all information gaps, no matter how extensive the commitment of public resources involved. The question is not whether scientific uncertainty exists but whether relevant information is missing and

whether there is uncertainty over relevant risks that need to be addressed in the EIS prior to federal action. The Ninth Circuit's decision is bereft of any attempt to provide a guiding rudder to BLM as to which risks are relevant risks that must be investigated. By failing to announce criteria of relevance to be applied in implementing the CEQ's worst case analysis the Court has set for BLM an impossible task, that of removing all uncertainty, of filling all information gaps. Had the Court addressed itself, as the Congress did in amending FIFRA in 1978, to the real life problems of herbicide use and protecting the environment from adverse affects, it would have seen the need for fashioning a triggering mechanism on the basis of which it would be possible to

identify relevant risks. The construction of a test for risk relevancy is the very task Congress set itself in 1978. At that time Congress decided that the relevant test for risk to the environment through herbicide use should be based on "a validated test or other significant evidence raising prudent concerns of unreasonable risk to man or the environment" ((1978) U.S. Code Cong. and Ad. News 2051).

The test which Congress laid down for the EPA when evaluating the risk of herbicide use to the environment in general must surely be of some relevance to agencies such as BLM when evaluating the particular environmental impact of given herbicides in its EIS. To cut off federal agencies from reliance upon EPA registration of

the herbicide in the agency's assessment of herbicide use is not only to engender unproductive replication of government expenditures, but is alwo unwarranted in legal principle. For that reason also the assertion by the Court that FIFRA is irrelevant to the compilation of an EIS concerned with the environmental impact of herbicide use seems nonsensical. The environmental affect of herbicide use is the predominant concern of FIFRA.

If the Ninth Circuit's decision in SOCATS v. Clark, supra, is allowed to stand a number of results will follow. In the first place, FIFRA's mandate will be undercut. Every agency that now uses herbicides will have to duplicate, on its own, the work presently entrusted to the EPA by Congress. Public funds will be

expended unnecessarily in unproductive duplication. Equally, herbicide registration will become the province of every herbicide using agency, not just one, the EPA, as Congress had intended. Even though the EPA will have made its statutorily dictated determination that a registered herbicide does not present an unreasonable adverse risk to the environment or human health, federal agencies will be required to ignore that determination and begin afresh the task already carried out by EPA. Although the private sector will be able to use the herbicides registered under FIFRA, the federal agencies, as servants of the people and keepers of the public trust, will be forbidden access to the same herbicides, even though very often the agencies perform the same kinds

of tasks as the private sector herbicide users. It is difficult to perceive a rational position for FIFRA after the Ninth Circuit's SOCATS decision and yet the Congress has labored long and hard, over many sessions, to fashion legislation to safeguard the environment from adverse herbicide use. If the Ninth Circuit prevails, that Congressional effort will have been severely discounted. A means does exist, however, by which the mandate of NEPA, as interpreted in the CEQ Regulations, can be harmonized and implemented at the same time as the Congressionally dictated safeguards embodied in FIFRA. That means is by adoption of the Congressionally fashioned risk relevance criteria laid down in FIFRA, particularly in the 1978 amendments. Under this approach

a risk would be relevant, so as to trigger the need for a worst case analysis, if there was an information gap or scientific uncertainty relating to it, where a "validated test or other significant evidence raising prudent concerns of unreasonable risk to man or the environment" exists. In practical terms what that would mean is that if EPA has registrered a herbicide under FIFRA, other federal agencies would be able to rely on that registration in compiling their EIS's. They could rely upon it, not in any unreflective automatic manner but in a responsible way as a <u>beginning</u> to their risk assessment, not in total fulfillment of it. The agency would have to go further than simply checking to ensure that the herbicide was registered.

The agency would have to actively search for "significant evidence" that might exist as to unreasonable risks presented by the use of the herbicide. Normally, such a search would take the form of a thorough literature search of the most current scientific research being developed on the use of the herbicide. Only if that search, coupled with the data compiled by EPA in its FIFRA registration process, presented "significant evidence" such that "prudent concerns" are raised that the herbicide use might probably present risks to humans and their environment would one be able to conclude that a relevant risk existed. That relevant risk assessment might then trigger the need for a worst case analysis if there was scientific uncertainty or data gaps

relating to probable, relevant risks. Prior to that point one would be engaging in fear analysis, not risk analysis. Only the latter will present relevant information needed to be included in the EIS.

CONCLUSION

For the foregoing reasons, the Federal Government's petition for writ of certiorari should be granted.

Respectfully submitted,

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_____
Dated